In the Supreme Court of the United States

NELLIE ALLEN POAGUE, Petitioner,

vs.

BUTTE COPPER AND ZINC COMPANY, a corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Now comes Nellie Allen Poague, the above named petitioner, and respectfully petitions the Court for the issuance of a Writ of Certiorari addressed to the said United States Circuit Court of Appeals for the Ninth Circuit, directing said Court to certify the above entitled cause to this Court for review and final decision.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 10, 1947. (R. 442.)

The jurisdiction of the District Court arises from U. S. C. A., Title 28, Sec. 41; Sec. 24 of the Judicial Code, as amended.

The jurisdiction of The Supreme Court arises from

U. S. C. A., Title 28, Sec. 347; Sec. 240 of the Judicial Code, as amended by the Act of February 13th, 1925, 43 Stat. 936. The facts conferring jurisdiction of the District Court appear R. 2, diversity of citizenship and amount involved.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Nellie Allen Poague, a citizen of Montana, brought an action at law in the United States District Court of Montana, against Butte Copper and Zinc Company, a corporation of, and citizen of Maine, owning mining property in Montana. The action was for damages because of subsidence of her land under her buildings surrounded by the Nellie Lode Mining Claim, property of the Zinc Company, due to underground mining. This underground mining, however, was not done by the owner (proprietor) of the surrounding adjacent land, the Zinc Company, but was done by a lessee, mining under an operating contract from the owner, and which mining was done with the knowledge and consent of the Zinc Company. Of the net proceeds from the mining, whatever it might come to, the Zinc Company received one-half. (No fixed rent was defined in advance.)

The following quotation from the Circuit Court of Appeals' opinion reveals succinctly what we contend is error of that Court, and the ruling of the District Judge, which we submit was correct:

> "The jury was further instructed (in substance) that if a preponderance of the evidence convinced the jury that Anaconda did the actual mining work,

with the knowledge and consent of Butte, and as its lessee, and such mining operations disturbed and withdrew from the surface of the property of plaintiff the subjacent or lateral support of the said surface, as a direct and proximate result of which the surface subsided and caused injury and damage to the plaintiff's buildings, then the defendant (Butte) was liable for all resulting damages.

Obviously the evidence made plain that Anaconda was doing mining work 'with the knowledge and consent' of Butte. The lease agreement and the working of the mine by Anaconda under the terms of the lease, proclaim that to be a fact which Butte would not and does not deny. We are here concerned with the established status of Butte and Anaconda under their lease agreement, a status which in our opinion does not impose upon Butte legal liability for the injuries visited upon the proprietor of appellee. The Court's instructions were clearly erroneous in that they did unlawfully impose liability upon Butte for the mining operations carried on by Anaconda under the premises of appellee, *all of which operation were carried on under and by virtue of the terms and conditions of the lease agreement between Butte and Anaconda.*" (Italics ours.)

There is no opinion of the District Court. The Appellate Court's opinion is found R. 432. It was entered November 10, 1947. It will be reported 164 Fed. (2nd), 201.

The case was tried to a jury in the District Court. Verdict and judgment in favor of Poague for damages exceeding $3,000.00, exclusive of interest and costs.

The Circuit Court of Appeals disposed of the case finally and completely by an opinion reversing *on just one ground* which recited:

> "Since we are of the view that under the facts of this case, appellee is not entitled to recover from appellant, we find it unnecessary to pass upon other contentions raised in the brief. The Judgment of the lower court is reversed."

After such language, of course, further litigation in the trial court is vain. Petition for rehearing was made, and denied Dec. 10, 1947. R. 443.

QUESTION INVOLVED.

Is there a non-delegable duty resting on the owner (proprietor) of adjacent surrounding land, and of the minerals under adjacent land, to not disturb, by mining thereunder, the surface of his neighbor's land, and not permit others by lease of, or working contract, (contemplating dangerous excavation on his land) the surface of his neighbor's land to be injured by the removal of the lateral and subjacent support given by nature of his own land to the neighbor's land?

SPECIFICATION OF ERRORS.

I.

(a) The Honorable, the Circuit Court of Appeals, has here decided a question of local law in a way in conflict with applicable local decisions. It is important. The decision challenges, clouds and impairs the quiet enjoyment of all other urban real property, as also that of a large section of Butte, wherein, by this operation, churches, schools, apartment buildings, residences have been destroyed.

II.

The question of a primary liability of the owner as distinguished from the liability of the lessee has been acted on differently by the Circuit Court of Appeals of the Sixth Circuit in Harris Stanley Coal and Land Co. vs. Chesapeake & Ohio Ry. Co., 154 Fed. 2nd 450, and in that case, certiorari was denied,

No. 438 October term, 1946, 91 L. Ed. 65. Advance Sheets.

(The point was not raised there, however; possibly because deemed beyond debate.)

III.

Petitioner asserts that her right to lateral and subjacent support from adjacent land of Zinc Company is as a covenant running against the owner of adjacent land, a servitude against such land which the owner cannot lawfully impair by any contract with a third party, to which petitioner was not a party.

IV.

She asserts that the question is of great importance. The territorial jurisdiction of the Ninth Circuit Court of Appeals is immense. The decision is in conflict not only with local decisions of Montana, where the case arose, but also with those of California, where has long existed an identical statute to that of Montana. The question has local importance. As appears from the citations to the record in the accompanying brief, through the same mining operation, a large section of the City of Butte

has subsided, to lasting damage of buildings used for schools, churches, apartments, residences; breaking water mains, gas mains, breaking the surface of streets. The growing use of subways and deep foundations gives the question importance outside of mining areas. Railway cuts involve the question. As precedent, any C. C. A. opinion is cited in every circuit if germane. This one is opposed to general law.

V.

Petitioner asserts that here the Honorable Ninth Circuit Court of Appeals has decided an important question of local law in a way in conflict with applicable decisions of the Montana Supreme Court and of the Montana legislature.

A brief under this cover accompanies this petition.

W H E R E F O R E, petitioner prays that the Writ of Certiorari be issued to the Honorable, the United State Circuit Court of Appeals for the Ninth Circuit, requiring it to certify a transcript of the record of the case to this Court for review and reversal.

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EARLE N. GENZBERGER,
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Of counsel for Petitioner.

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Respondent.

PETITIONER'S BRIEF

STATEMENT OF THE CASE.

By stipulation of counsel, Poague, since December 13, 1910, has been, and now is the owner of, and in possession of all of Lot 4 and the North 10 feet of Lot 5, Block 67, Original Townsite of Butte, excepting and reserving, however, all of the ores and minerals beneath the surface thereof, with the right of defendant to mine for and extract the same. R. 27.

This was a part of the Nellie Lode claim, of which the defendant, Zinc Company, was the owner since July 6, 1917. R. 380. On that day Zinc Company leased for mining purposes to a third party, Anaconda Company, the Nellie Lode surrounding the Poague property. R. 371.

By 1918 the workings ran under the Poague property. R. 302. The work continued by the lessee until June 24,

1940. A new agreement and lease, cancelling the old one, was then entered into. R. 394. *By this lease, R. 404, permission was given by the owner to extract and remove all ores and minerals which may be encountered in the Nellie Lode Claim, R. 404.* The workings ran under plaintiff's property in 1918. R. 302. This lease was to run until June 24, 1950. R. 403.

On Poague's property there was a brick house when she bought it. R. 30. Underneath the surface of Poague's property big mining timbers were crushed. R. 196. Large blasts, night and day, were heard, causing pictures to fall, the stove pipe to fall. R. 154.

Poague brought suit; an amended complaint, R. 2, was filed April 1st, 1946. She claimed damages in the sum of $7,000.00, alleging that the defendant, by itself, and through its agent, servant, or partner, Anaconda Company, had, by underground mining in adjacent land, wrongfully destroyed and impaired the subjacent and lateral support of her lands, and both of the buildings thereon. The defendant answered, R. 7, with what amounted to a general denial, and without any affirmative claim that additional weight of buildings had all contributed to subsidence.

Water pipes were broken over a large area around the property. Testimony of Plummer. R. 109. R. 153.

The course of the main escarpment caused by the mining operation was described through streets and across streets, under apartment properties, under a hospital, and the ground South of the main escarpment for 500 feet had sunk since 1922. R. 261. One building had been damaged and torn down. R. 273. These escarpments were

observed simultaneously with the work of mining. R. 294. One escarpment struck a school building. R. 293. One struck the Jewish Synagogue. R. 292. Mining was the cause of the movement on the fault. R. 292.

These citations are but a sample. The record contains many other instances casually mentioned.

On a trial before a jury, verdict was in favor of the plaintiff. R. 11. Judgment being entered, R. 12, the defendant appealed, R. 13. The Circuit Court of Appeals reversed and limited its decision to the one point,—that the owner, defendant, lessor, and a party to the working contract, was not liable for acts of Anaconda. R. 432.

Certiorari is asked to review that decision.

We have specified the errors in the petition for Certiorari annexed. For convenience, we repeat both the question involved and the Specification.

QUESTION INVOLVED.

Is there a non-delegable duty resting on the owner (proprietor) of adjacent surrounding land, and of the minerals under adjacent land, to not disturb, by mining thereunder, the surface of his neighbor's land, and not permit others by lease of, or working contract (contemplating dangerous excavation on his land) the surface of his neighbor's land to be injured by the removal of the lateral and *subjacent* support given by nature of his own land to the neighbor's land?

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ARGUMENT AND AUTHORITIES.

The approach to this argument recalls happy days of fifty-five years ago in the Old Rotunda near Monticello where one of the glaring sign posts on the road to Wisdom said:

"Bower v. Peate, 1 Queen's Bench Division 321."

The opinion was delivered by Cockburn, Chief Justice, whom we were told was one of the ablest judges of all time. It is most unusual that we can answer one test to gain a review in this Court; that is the "importance of the question," with high legal authority, but this opinion starts out:

> "The facts of this case *which involves a point of considerable importance* * *".

The subsequent growth of English and American cities points the truth that the learned Chief Justice was understating, when he said that the point was of *considerable importance.*

We think that the question which was then of sufficient importance to engage a review by the Court of Queen's Bench is now of sufficient importance to ask this Court for a Writ of Review. On private civil rights the opinion carries its credentials on its face. Fifty-five years ago it was regarded as a leading case.

In 1926 the author of a note found to:

> Pickett v. Waldorf System 241 Mass. 569; 136 N. E. 64; 23 A. L. R. 1014, wrote:

> "The following passage in the judgment delivered by Cockburn, Ch. J., in Bower v. Peate, which is regarded both in England and the United States as

a leading case, contains the most accurate and comprehensive exposition of the doctrine discused in this monograph: 'A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevent may arise."

We have checked the quotation with the language of the Court. It is exact.

Some courts have strayed from this doctrine, and come back by their own subsequent decisions.

The California Court strayed away in Aston v. Nolan, 63 Cal. 269. It came back in Green vs. Berge, 38 Pac. 539; 105 Cal. 52, and based its ruling right on Bower vs. Peate, as also on a case from Massachusetts, a case from

Pennsylvania, and a case from Vermont.

In 1892 the claim of the defendant here, was raised in Cohen vs. Simmons, 21 N. Y. Supp. 385. The New York Court spoke of the claim that only the contractors were liable, and not the owner.

"This proposition does not merit discussion."

The opinion was not by the court of last appeal in New York, but successive appeals resulted in affirmance without opinion. The New York Court in that opinion disposed of the question as to whether *negligence* is involved.

> "It is entirely immaterial as far as this act is concerned whether the excavator allows the adjoining house to fall scientifically, or negligently."

Respectful of that language; Poage did not charge that the act of causing her house and lot to subside was negligent, but just that it all caved in, due to the act of undermining.

The local decision of the Montana legislature on this point is found in a statute identical with the California statute on the subject. The Supreme Court of California in Green v. Berge, supra, refers to the California statute; each statute is exactly:

> "Each co-terminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precaution to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations."
>
> R. C. Mont., 1935, Sec. 6773. Cal. Civil Code, Sec. 832.

The Montana statute has been in effect since 1895.

Sec. 1293 Civil Code of Montana, 1895.

The part of the foregoing statute commencing with "subject to" has no relevancy; mining has no purpose of contruction.

Probably the Montana statute was taken from California. That question, too, is beside the case, because English words mean the same in Montana as they do in California. The California court speaks of their statute in Green vs. Berge, supra, as follows:

> "A landowner has an interest in adjoining land for the lateral support of his soil. This is a limitation upon the rights of landowners. Whoever deprives him of this support for the land, otherwise than as the statute has prescribed, performs an unlawful act. The general rule is that all who unite in such acts are wrongdoers, and are responsible in damages. Respondent knew, or should have known, that to make the excavation without supplying the support was unlawful. Having participated in it, he cannot avoid responsibility by pleading that he did the work under a contract."
>
> Green v. Berge, 1894, (supra).

The liability of the land owner was again recently sustained by a California Court of Appeals.

> Wharam v. Investment Underwriters, (Cal. App.) 136, 136 Pac. (2nd) 363. (1943.)

There the Court remarked:

> "This holding is supported by the weight of authority throughout the United States."

MONTANA HOLDINGS.

The Montana Supreme Court has quoted with approval almost as much from Bower v. Peate, supra, as we have in this brief.

Ulmen v. Schwieger, 92 Mont. 331, at page 348; 12 Pac. 2nd 856.

The owner of a quarry, a nuisance from concussion of air by blasting, was enjoined, along with a lessee or independent contractor. There the court said the law was the same in an action for damages as it was for an injunction.

Fagan v. Silver, 57 Mont. 427, 188 Pac. 900.

Blasting underground may be just as legally a nuisance as blasting above ground.

If the nuisance consists merely of a deadly threat,—a powder house too close to homes, the landlord cannot delegate the keeping of it so as to avoid liability.

Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312; 56 Pac. 358. (Opinion by Judge Hunt, one of the leading judges of the Montana Supreme Court, and also of the Ninth Circuit Court of Appeals.)

> "* * * and the landlord cannot evade his public duty by private agreement to shift it to another, although such a contract may permit the landlord to recoup his losses from his tenant. Why, then, should the mere fact that the owner has leased the building, in whole or in part, change the rule of liability recognized in all of the decisions in this class of cases? In fact, those decisions which make the statement that it does, overlook the public duty

of the owner and consider the duty of the landlord and tenant inter sese."

Mitchell v. Thomas, 91 Mont. 370, at page 389; 8 Pac. 2nd 639.

And again:

"In the second place, the corporation, the owner of the property, in arranging to have repairs done upon it, the installment of which would probably result in creating a condition dangerous to neighboring property owners, was under obligation to provide that reasonable care should be taken to obviate the probable consequences. As was pointed out in Railroad Co. vs. Morey, 47 Ohio St. 207, 7 L. R. A., 701, 24 N. E. 269, a proprietor's liability 'is based upon the principle that he cannot set in operation causes dangerous to the person or property of others, without taking all reasonable precautions to anticipate, obviate and prevent these probable consequences.' Under this rule, an employer may not divest himself of the primary duty he owes to other members of the community by contracting with others for the performance of work, the necessary or probable result of which is injury to third persons. Other courts have stated the rule in substantially the same terms."

A. M. Holter Hardware Co. v. Western Mortgage Co., 51 Mont. 94; 149 Pac. 489.

"A proprietor is an owner, and an owner is a proprietor."

Bouvier's Law Dictionary.

The opinion of the learned Court of Appeals seems to us to be specious. The Court looked for the liability of the owner in the wrong place, i. e., in the contracts between landlord and lessee. The Court cites some cases where the liability also does exist there, and distinguishes

the facts here from such cases. The place to find the liability is in the law of lateral and subjacent support, as announced by courts, and as found in the Montana Statute. It is an easement in favor of a landowner to have his surface sustained by the land of his neighbor. It is a covenant raised by law against adjoining land. A similar covenant might arise from contract. It frequently does. There, it is a covenant running with the land against adjoining land. The owner of the latter cannot break it directly or indirectly.

Thus considered, it is not surprising to find that no case cited by the learned Court of Appeals is in point against Poague's contention. (Candidly, there is one from Pennsylvania of date 1846, many years before Bower v. Peate.)

The first case cited in the opinion, R. 437, is that of Greek Catholic Congregation vs. Plummer, (Pa.) 12 Atl. 2nd, 435. The action involved the ownership of coal alleged to have been wrongfully taken from plaintiff's land by defendants. It was a suit to recover for coal taken from land which the defendant had quiteclaimed to a lessee in settlement of a controverted title. The Court held that the defendant was not owner.

The case of Alabama Clay Products Company v. Black, 110 So. 151, cited in the opinion went off on a point of pleading not involving merits.

The Court cited Republic Iron & Steel Co. v. Barter (Ala.) 118 So., 749, at p. 751. R. 438. A later Alabama case which seems in favor of our position.

Butte Copper and Zinc had previously opened the mine, had mined certain ores. Later Anaconda, under a lease

from Butte, re-mined this property, and the plaintiff's property subsided. The case of Republic Iron & Steel Co. v. Barter (Ala.) 1928; 118 So. 749, was an action by the owner of the surface against the owner of the mineral rights thereunder, and it appeared that the defendant in the past, opened a mine under the plaintiff's property and had mined the coal therefrom, leaving pillars and stumps sufficient for subjacent support of the surface, but for several years past, had not operated the mine. Later, defendant leased the property to one Blackwell to mine the coal that was left, and provided that "the lessee is to secure from all surface owners, written releases relieving the company from damage claims as a result of mining operations, breaking the surface, etc." and gave to the lessee full charge of the operations. The lease also contained a clause "that the lessee shall save the company harmless against * * * and pay any claims of any owners of the surface." The surface subsided and the appellant owner contended that Blackwell the lessee *and not the lessor,* was liable. Final judgment went against the owner.

> "Yet where, as here, the lease contemplates and expressly authorizes the lessee to rob the mine of pillars, and leave the surface without subjacent supports, the lessor as well as the lessee, is liable. Little Schuylkell Navigation R. Coal Co. v. Tamaqua, 1 Walk. (Pa.) 488; Campbell v. Louisville Coal Mining Co., 39 Colo. 379, 89 P. 167, 10 A. L. R. (N. S.) 822. This on the principle embodied in the maxim "Sic utere tuo ut alienum non laedas."
>
> Williams v. Gibson, 84 Ala. 228, 233, r. S. 350, 5 Am. St. Rep. 368, 60 Atl. 924, 69 L. R. A. 637.

> The principle is established by universal authority that the right to subjacent support, unless waived by express stipulation, is absolute, and the owner of the servient estate is liable for its destruction without regard to whether it is destroyed by or through negligence or design, without negligence. Ala. Clay Products Co. v. Black, 110 So. 151; West Pratt Coal Co. v. Dorman, et al., 161 Ala. 389; 49 So. 849, 23 L. R. A. (N. S.) 850, 135 Am. St. Rep. 127, 18 Ann. Cas. 750; Republic Iron & Steel Co. v. Barter (Ala.) 118 So. 749, at p. 751.

With reference to the duty of surface support, the Supreme Court of Alabama, after the decision in the case of Alabama Clay Products vs. Black, supra, relied upon by this Court, said:

> "It cannot avoid this duty or liability for a breach thereof by expressly authorizing Blackwell to do that which it could not legally do. The duty here springs out of plaintiff's right and rests upon the owner of the servient estate.
>
> * * * And this is true, though no control or direction over the work is retained and exercised."
>
> Republic Iron & Steel Co. v. Barter, supra.

So that the Alabama law cited does not support the conclusion of the Court at page 5 of the opinion.

The Court also cites the case of Jackson Hill Coal Co. v. Bales (Ind.) 108 N. E. 962. R. 437. No facts are stated in that opinion, but it does appear that the Court did give Instruction No. 2 (see 108 N. E. at p. 964) to the effect that "the owner of the minerals could not remove same without leaving proper support for the surface." The case apparently held the owner of the mine

and not the lessee, liable. It does not support the proposition for which the Court has cited it.

The Pennsylvania case of Kistler v. Thompson, 27 Atl. 874, R 438, was an action brought by the owner of a dwelling house against the defendant owner of the mine for work done by a lessee thereof which injured plaintiff's house and lot. The Supreme Court passed upon the charge of the Court below to the jury in that case.

> "The defendant was the owner of the mine. He received the royalty for the coal taken out. It was his interest to have as much coal taken out as was possible, and did give frequent and explicit directions as to taking coal from the pillars and supports of the mine."

Admittedly there was control there, but the question of liability without control was not decided.

In the case of Cabot v. Kingman (Mass.) 33 L. R. A., 44 N. E. 344, R. 438, it was held that sewer commissioners were liable together with the independent contractor for destruction of lateral support in constructing a sewer regardless of the question whether or not control over the manner of operation had been retained.

The limitation on the exceptions to the doctrine of respondent superior as applicable to subsidence from withdrawal of lateral or subjacent support is ably discussed in:

> Thompson on Negligence, paragraphs 654, 665 and 668.

In 1918, the workings had passed under Poague's property. R. 302. In the new lease to the same lessee

from the defendant of June 24, 1940, appear the following words:

> "It is agreed that the Mining Company shall have the right, during the term hereof, to work all of the said premises above described and referred to in mining fashion, and extract and remove therefrom all ores and minerals which may be encountered, and which in the Mining Company's opinion it may be desirable or profitable to extract and remove." R. 404.

But the courts knew, as all other sensible persons would know, as early as 1927:

> "It goes without saying that the removal of any part of subjacent support has some tendency to bring down what is above."
>
> Standard Oil Co. vs. Watts, C. C. A. 7th, 1927, 17 F. 2nd 981.

The doctrine of respondent superior does admit exceptions as to some acts of independent contractors, but where there is a primary duty resting on one, he cannot escape liability where he contracts with another to do work that will probably result in breach of that duty unless precautions are taken, and such precautions are not taken and detriment to the obligee is so caused.

The great work of the Circuit Courts of Appeal has created such respect for the opinions of those Courts that the opinion from any circuit is proudly cited as precedent in other circuits. A decision may have importance not only for being cited as a precedent in actual litigation, but also from being cited as a precedent in the examination of titles and servitudes inherent in the ownership of real property.

We respectfully submit that this opinion of the learned Circuit Court of Appeals is erroneous, and it clouds the right to quiet possession of all urban, and much rural real property in the Ninth Circuit—it befogs such rights throughout the United States.

We think that beyond a doubt, the Honorable Circuit Court of Appeals is in error here, and that the probability of conflict with local decisions is beyond reasonable doubt, and that the question is as Lord Cockburn found it seventy-five years ago,—of great importance, and that the Writ should issue.

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No. 547

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REPLY BRIEF OF PETITIONER

The District Court in entering judgment for the plaintiff therein, Poague, who is petitioner here, had submitted the case to a jury, and the judgment was on a verdict which, of course, implies that every inference which might be drawn from the testimony favorable to the plaintiff, had been found in plaintiff's favor. R. 11.

In reciting case after case wherein adjacent owners, who are lessors, have been held liable under circumstances additional to the rule of liability as owner, there is a tacit admission throughout the reply brief of the respondent, that the decision of the Circuit Court of Appeals went further than permitted under the law, "That under the facts in this case, appellee is not entitled to recover from appellant." R. 441.

On page 17 of the brief is an inaccurate statement. The respondent asserts "In this connection, is should also

be pointed out that petitioner's property lies on the surface of the Nellie Lode Mining Claim. (R. 176). There is no record of any mining ever having been done on the Nellie. The mining, according to the record, was all performed in the Emma Mine." The speciousness of this statement, and its inaccuracy, even appears from the following language in the brief itself: "The Emma Vein apexes 500 feet north of the Poague property (R. 199-200), and has been mined from the 200-foot level to the 2200-foot level down slope of the vein (R. 290), which on its dip extralaterally passes beneath the Petitioner's lots 600 to 800 feet below the surface." The defendant owned also the Emma Mine. (R. 380 and R. 371.)

As pointed out in Petitioner's brief, page 1, in the year 1918, the excavation ran under the Poague property, R. 302. That this actual invasion of Poague's property by the lessee was known to the lessor owner, could have been well found by the jury, as also that such knowledge existed before the execution of the agreement of extension of date July 8, 1936, R. 384, and, of course, before the agreement of further extension of July 8, 1941, and before the lease of June 24, 1940. This brings the liability of the lessor directly within the language quoted from the American Law Institute, Restatement of Torts, on page 19 and 20, Respondent's Brief. "Where, however, the lessor makes the lease under the condition stated in clauses (a) and (b), he subjects himself to liability."

At page 294, subsections (a) and (b) of Section 837, read as follows:

> (a) "At the time when the lease was made, renewed or amended, the lessor consented to the carry-

ing on of the activity, or knew that it would be carried on, and

(b) "The activity, as the lessor should have known, necessarily involved, or was already causing such an invasion."

The removal of *subjacent* support, without permanently maintaining artificial support, is certain, eventually, to cause the surface to settle. A jury would hardly be allowed to deny that. The law also draws a strong inference as to the effect of removal of subjacent support.

"IMPORTANT FACTORS IN REASONABLE CONDUCT. The requirement of reasonable conduct emphasized in comment (e), 819, in respect to lateral support is applicable to the subjacent support, but it produces a different result. In the case of subjacent support, the owner of the supported land is normally unable to provide artificial support for his land to replace subjacent support that may be withdrawn. This comparative helplessness of the owner of the supported land weighs heavily against the utility of the conduct of the owner of the supporting land in withdrawing the subjacent support. The legal regard for the interest of the owner of the supported land and the recognition of his helplessness tend to outweigh the utility of the conduct of the owner of the supporting land, and makes conduct on his part, which would be reasonable in respect to lateral support, unreasonable in respect to subjacent support. Thus the standard of conduct required of the actor in respect to subjacent support is so high that his liability for negligence approximates the absolute liability stated in 820."

American Law Institute, Restatement of the Law Torts, Vol. 4, Subdivision C, Sec. 821.

Whether, when the new extensions took place, or previous to 1918, the invasion had been made by the owner or by another, is not important. It was the duty of the owner, lessor, to see that excavations under the land of Poague be properly supported, and it could not delegate this duty to another by any of the subsequent leases so as to absolve itself from liability. A jury can certainly find that the removal of subjacent support amounts to a nuisance, or necessarily operates to injure or destroy the property of the owner of the surface ground *unless* artificial support is maintained permanently.

This court has spoken of non-delegability of duties of an owner of property so as to absolve himself from liability, though doing work on his property through an independent contractor or lessee, if such work, of itself, will injure his neighbor unless certain precautions are taken by the lessee, or independent contractor, where the work that the lessee or contractor is to do, of itself, amounts to a *nuisance or necessarily operates to injure or destroy the property of plaintiff.*

Weinman v. DePalma, 232 U. S., p. 570; 58 L. Ed. 733;

Robins v. Chicago City, 4 Wallace 657.

Analogous to the above doctrine is the public duty owed by a lessor railroad, under its charter, to a member of the public injured by the lessee actively operating the leased lines.

North Carolina Ry. Co. v. Zachery, 232 U. S. 248; 58 L. Ed. 591.

In Catron v. South Butte Mining Co., 181 Fed. 941, C. C. A. 9th, the plaintiff obtained a decree enjoining defendants, who were admitted to own the minerals beneath the surface, from extracting the same in any way so as to injure the surface; the injunction was based upon the common law right of support. Could the owner, owning the minerals, evade liability for breach of that injunction by leasing his land to another for the purpose of extracting the minerals? We think not. The duty resting on the owner to sustain with his land lateral and subjacent support arises as well from law as it did in the *Catron case* from injunction based on the law.

> "LIABILITY FOR REMOVING THE SUBJACENT SUPPORT OF LAND:—Since the leading case of *Humphries v. Brogden,* it does not appear to have been doubted, either in England or America, that prima facie, the owner of the surface land is entitled, *ex jure naturae,* to have his land supported by the subjacent strata, and that one having a right to win minerals beneath is bound to leave sufficient ribs or columns to support the soil at the surface, or pay the damages which may result from its subsidence; and if such subsidence is caused by reason of his not leaving sufficient support, it will be no defense that he worked the mines carefully and according to custom."
>
> Thompson on Negligence, p. 1013.

The question exposes a particular application of a general rule. Where there is any kind of a legal duty resting on one, responsibility for doing the duty cannot be shifted so as to free the one primarily liable from liability, if there is a breach by the independent contractor or lessee

doing, by agreement, work likely to result in injury to the obligee unless certain precautions are taken.

The magnitude of the subsidence of whole city blocks presents evidence that many years of mining were needed to produce the result, and that the owner preserving in all the leases, its right to inspect, certainly cannot claim ignorance of the failure of its lessee to be doing the duty cast by law on itself. This evidence was enough to create an inference of breach of duty on the part of defendant.

A covenant to protect the surface is implied, and creates an absolute right to surface support.

Williams v. Hay, 120 Pa. 485; 14 Atl. 379;

Catron v. South Butte Mng. Co. (C. C. A. 9th), 181 Fed. 941.

Can any appellate court presume that there were no experienced miners on this jury, permitted to use for deliberation, their knowledge gained from experience?

Knowledge of the owner of a dangerous condition of his own premises may be presumed from its existence for a period of time varying on circumstances. To hold that defendant did not know, in a few weeks after it happened, that workings on its vein had in 1918 gone under Poague's property, is against all human experience.

(Of course, if a review is granted, the volume of the excavations will appear from maps in exhibit. The jury saw such.)

As said by defendant in brief, the excavation passed under Poague's property 600 to 800 feet deep. O'Kelly said 12 cubic feet of Butte granite make a ton, i. e.: At 600 feet there was 50 tons,—100,000 pounds of weight

above every square foot. R. 299. It is not a solid mass. The average size of a block of Butte granite is less than five cubic feet. It is an accepted truth that solids flow under pressure. R. 299-R. 298. In 1918 there was a cause that would inevitably finally destroy plaintiff's property unless extraordinary precautions were taken, *and maintained.*

We respectfully submit the Writ should be granted, and the decision of the Honorable Circuit Court of Appeals should be reversed, and the judgment of the trial court affirmed.

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SUBJECT MATTER INDEX

CITATIONS

INDEX (Continued)

STATUTES

MISCELLANEOUS

No. 547

IN THE

SUPREME COURT

OF THE

UNITED STATES

NELLIE ALLEN POAGUE,

Petitioner,

vs.

BUTTE COPPER AND ZINC COMPANY,
a corporation,

Respondent.

RESPONDENT'S REPLY BRIEF TO PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF FACTS

The Petitioner has, since December 8, 1910, been the owner of the surface only of Lot 4 and the north 10 feet of Lot 5, Block 67 of the Original Townsite of Butte, Montana, together with a dwelling house and garage situated thereon. (R. 27-28.) The Respondent has, since 1917, been the owner of the minerals beneath said lots. (R. 158.)

On July 6, 1917, Respondent leased and demised the mining property here involved to the Anaconda Copper Mining Company, referred to in the agreement as the "Mining Company." (R. 164 and 371,

372.) This lease was introduced in evidence as Plaintiff's Exhibit 8-A. (R. 164.) It was in effect until July 8, 1931 (R. 373), and provided that, as consideration therefor, Respondent was to receive fifty per cent (50%) of the net returns from all ores and minerals mined thereunder (R. 375). Among other things, and as far as material here, said lease contained the following provisions:

> " * * * It is agreed that the said Mining Company shall have the right, during the said leased term, to work all of the said premises above described and referred to, in mine fashion, and to extract and remove therefrom all ores and minerals which may be encountered, and which, in the Mining Company's opinion, may be desirable or profitable to extract and remove." (R. 373.)
>
> "The said Mining Company agrees that it will, during the said leased term, continue in possession of said leased premises and the mine workings therein contained, and that it will install and provide such suitable equipment and machinery as may be necessary in order to operate the same." (R. 373.)
>
> " * * * All work done by the Mining Company on said property shall be done in a good, workmanlike, minerlike and substantial manner." (R. 373.)
>
> " * * * It is understood and agreed that the management of the property hereby leased, and the conduct of all mining operations thereon, shall be vested exclusively in the Mining Company, or such person or representatives as it may designate; * * *." (R. 376.)

Exhibit 9 (R. 166 and 382), introduced by Plaintiff, was an agreement between Respondent and Anaconda, extending the aforesaid lease until and includ-

ing July 8, 1936 (R. 384). Exhibit 10 (R. 167 and 386), introduced by Plaintiff, was a further extension of said lease to and including July 8, 1941 (R. 390).

Exhibit 11 (R. 167-168 and 394), introduced by Plaintiff, dated June 24, 1940, is an agreement between Respondent and Anaconda whereby Respondent " * * * leases, lets and demises * * *" the property leased under the aforesaid lease dated July 6, 1917, and other property (R. 396-403) for fifty per cent (50%) of the net returns from all ores and minerals mined thereunder (R. 405-406) from June 24, 1940, until and including June 24, 1950, and cancels the lease dated July 6, 1917 (R. 403). Said lease of June 24, 1940, contains provisions substantially identical with the provisions contained in the lease of July 6, 1917, and in each extension thereof, which are hereinbefore specifically set forth. (R. 404, 406-407.) All mining conducted in the property has been performed by the Anaconda Copper Mining Company. (R. 287.)

That the property of Petitioner was damaged by subsidence due to underground mining operations in the Emma Lode is conceded by Respondent. The first evidence that there was any subsidence in the area was in the year 1941. (R. 45 and 293.)

The trial of the case was held in March and April, 1947 (R. 25), and appellant was awarded a verdict in the sum of $5,500.00 (R. 11 and 370). The case was appealed to the Ninth Circuit Court of Appeals and on November 10, 1947, the judgment of the District Court was reversed. (R. 432.)

QUESTION

Is the lessor of a mining property liable for damage to surface owners' property caused by the mining operations of his lessee if (1) he neither retains nor assumes control over the lessee's operations; (2) the lease does not expressly provide for operations that will necessarily cause subsidence; (3) the lessor neither knew nor should have known when the lease was made that the operations would cause subsidence; and (4) the lessee was not guilty of any act of negligence in its mining operations? (R. 303.)

ARGUMENT AND AUTHORITIES

A. Specification of Error No. I

Petitioner's first specification of error is an assertion that the decision of the Honorable Circuit Court of Appeals has decided a question of local law in a way that conflicts with applicable local decisions. (Pet. Brief, p. 4.)

An examination of the decisions of Montana cited by Appellant shows that this specification is without merit. The first Montana case cited by Petitioner is Ulmen v. Schwieger, 92 Mont. 331, 12 P. 2d 856. (Pet. Brief, p. 10.) This case involves the liability of a road contractor for the acts of his subcontractor. The latter failed to put up warning signs and a motorist was misled thereby and drove into a hole in the road where a bridge was to be constructed. The Court held that the contract between the Highway Department and the contractor called for inherently dangerous work and the contract itself specifically placed a

duty upon the contractor to see that the necessary precautions were taken. Thus, the contractor could not delegate this duty to his subcontractor and thereby avoid liability.

The next Montana case cited by Petitioner is Fagan v. Silver, 57 Mont. 427, 188 P. 900. (Pet. Brief, p. 10.) Silver owned and operated a quarry and operated it in such a manner that it constituted a nuisance. Silver later turned the operation over to one Mackey and paid him so much a ton for the crushed rock placed in bins for Silver's use and benefit. There is no showing of any agreement respecting the manner in which Mackey would conduct the operation. As far as the record is concerned, there is nothing to show that Mackey was a lessee and on the facts shown he may have been an employee. The case establishes the rule that the operator of a nuisance cannot enter into a contract contemplating its continuance by some other party and thereby avoid being enjoined against its continued operation.

Cameron v. Kenyon-Connell Commercial Company, 22 Mont. 312, 56 P. 358 (Pet. Brief, p. 10), involves the question of the personal liability of trustees or directors of a corporation for a violation of a statute forbidding the storage of dynamite in quantities in excess of fifty pounds within the limits of an incorporated city.

Mitchell v. Thomas, 91 Mont. 370, 8 P. 2d 639, is the next Montana case cited. (Pet. Brief, p. 11.) In this case, the defendant-lessor was held liable in damages to a third party resulting from his failure to repair a coalhole which he had placed in the sidewalk

adjacent to premises leased by him. The Court held that he was liable for such damages, having had actual knowledge of the condition, having been warned by his tenant, by the city engineer and by policemen to repair the defects in the sidewalk and having promised but failed to do so. The Court also recognized that if the entire premises were leased, the weight of authority would have held that the landlord was not liable as he would have no right to enter and make repairs, but here the landlord had retained part of the building and had a duty to keep the sidewalk repaired.

The last Montana case cited by Petitioner is Holter Hardware Co. v. Western Mortgage Company, 51 Mont. 94, 149 P. 489. In that case the owner of a building entered into a contract to replace sheets of iron in a skylight with glass. An independent contractor did this, and thereby completed his contract. The sheets of iron remaining upon the roof were subsequently blown off and damaged Plaintiff's property. The Court specifically held that as there was no contract to remove the debris from the roof, the independent contractor had no duty to remove the same, but that the duty became that of the owner. Thus, in effect, the Court holds that the negligence was that of the owner and not the independent contractor. This case also held that the owner in arranging to have repairs made that would probably result in creating a condition dangerous to neighboring property owners was under obligation to provide that reasonable care should be taken to obviate the probable consequences of his act.

Respondent has no quarrel with the rules estab-

lished by these cases. However, none of these cases is pertinent to the present case and obviously there is no conflict between any of those cases and the decision of the Ninth Circuit Court of Appeals in the present case.

B. Specification of Error No. II

The next specification of error set forth in Petitioner's Brief (Pet. Brief, p. 4) is that the decision in this case is in conflict with the decision of the Sixth Circuit Court of Appeals in the case of Harris Stanley Coal and Land Co. v. Chesapeake & Ohio Ry. Co., 154 F. 2d 450. Petitioner calls the attention of the Court to the fact that the point involved in our case was not raised in the Harris Stanley case. (Pet. Brief, p. 4.) This is correct, and Respondent is, therefore, wholly unable to understand how any conflict can arise if the point here under consideration was not raised in that case. Furthermore, the case differs entirely from our case in that the lease there involved specifically provided for and contemplated the removal of the pillars that supported the surface. Thus, it falls within the exception noted in the Circuit Court's decision, i. e., that the lessor is not liable unless "* * * the lease expressly provides for operations which will cause surface subsidence * * *." (R. 437-438.)

C. Specifications of Error Nos. III and IV

The third specification of error set forth in Petitioner's Brief (Pet. Brief, p. 4) is to the effect that the right to lateral and subjacent support is as a cov-

enant running against the owner of adjacent land that cannot be impaired by a contract with a third party without the beneficiary of the covenant being made a party to the contract. The argument and authorities in support of each specification have not been separated in Petitioner's Brief and it is difficult, if not impossible, to determine what authorities are relied on by Petitioner to support this contention. Therefore, it will be necessary to reply to the argument of Petitioner on the third and fourth specifications of error together.

The fourth specification of error in Petitioner's Brief (Pet. Brief, p. 5) is to the effect that the question is of immense importance, is in conflict with local decisions and decisions in California, and is opposed to general law.

The argument of Petitioner on these points is spearheaded by a quotation from a note to *Pickett v. Waldorf System, 241 Mass. 569, 136 N. E. 64*, which is found in *23 A. L. R. at 1014*, wherein Bower v. Peate, 1 Queen's Bench Division 321, is quoted with approval. This latter case established the rule that:

> " * * * 'A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbor must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing someone else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious

> difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.' "

We have no quarrel with this rule. However, it is not in point so far as our present case is concerned. It does not involve a lessor-lessee relationship. It involves a contract that specifically called for work to be done from which injurious consequences must have been expected to arise. It should be noted here that the mining in our case had been conducted by Anaconda continuously since 1917 until sometime in 1941 without damage to anyone (R. 287 and 293) and that the cause of the subsidence was an unforeseeable slipping along the Middle Fault (R. 306).

The next case relied on is Green v. Berge, 38 P. 539, 105 Cal. 52. (Pet. Brief, p. 9.) In this case one Buckman, an independent contractor, graded a lot for Berge. Berge accepted the work as satisfactory by a written instrument. Subsequently, due to heavy rains, ground from the adjoining lot slid away. No precautions had been taken to prevent this. A verdict was directed in the lower court against Berge and in favor

of the adjoining lot owner. However, costs were awarded to Buckman against the Plaintiff, one Green. Berge, the lot owner, did not appeal. Green appealed from that part of the decision awarding Buckman costs. The Appellate Court reversed the decision and held that Buckman was liable. Thus, the case is authority for holding the independent contractor liable for failure to take necessary precautions when performing work that would foreseeably cause injury to third persons. In fact, the Court held that in this case failure to take such precaution was an unlawful act.

Cohen v. Simmons, 21 N. Y. Supp. 385, cited by Petitioner (Pet. Brief, p. 8) involves an excavation for a building. A statute provided that if an excavation was intended to be carried to depth greater than 10 feet below the curb line and there is a wall on adjoining land near the boundary, then the person *causing such excavation to be made* shall preserve said wall from injury. The contract involved specifically called for an excavation 14 feet in depth. There had been a previous contract to excavate only to a depth of 10 feet. The Court held as follows:

> "It is further urged that, if any cause of action exists, it is not against the defendant, but against the contractors, who caused the excavation to be made to a depth below 10 feet after the defendant had parted with the control of the property and of the work, for such excavation to a depth below 10 feet was not intended or contemplated at the time of the making of the original contract between the defendant and his contractor, and the time when he contracted and parted with the control of his property. But it does appear that subsequent to the first contract a second contract was made, which did contemplate going to a

depth of 14 feet; and the claim is now urged upon this court that, because the defendant parted with the possession of the property to the contractors under a contract to go 10 feet, when he made a new contract to go 14 feet, a recovery could only be had against the contractors. This proposition does not merit discussion." (At p. 387.)

Thus, the proposition that "did not merit discussion" was totally unlike the proposition in our present case.

Wharam v. Investment Underwriters (Cal. App.), 136 P. 2d 363 (1943) (Pet. Brief, p. 9), is another case involving an independent contractor. Plaintiff in that case had built a retaining wall at the rear of his lot. The adjoining lot owner contracted for the construction of a building. As a result of the excavation part of plaintiff's retaining wall fell in. There was unrebutted evidence that the contractor had extended his excavation into plaintiff's ground so that there was a direct trespass. Also, the owner of the adjoining lot had gone over the construction plans with the contractor, and it appeared from the plans that it would be necessary to excavate within the boundaries of plaintiff's lot. Thus, the owner approved the trespass necessarily involved and was, therefore, equally liable as a joint tort-feasor with the contractor.

The Petitioner takes the position that none of the cases relied on by the Ninth Circuit Court of Appeals is in point. (Pet. Brief, p. 12.) The case of Greek Catholic Congregation v. Plummer (Pa.), 12 A. 2d 435, is said to have nothing to do with the case at bar. However, that case specifically held that where the lease contained a provision that the owner of the mine

could periodically send an engineer into the mine to inspect and report the progress made by lessee, the lessor did not thereby retain any control or direction over the work. It had been contended by Petitioner that a similar provision in the lease in our case proved control and direction by Respondent.

The case of *Alabama Clay Products Company v. Black, 110 So. 151,* is characterized by Petitioner as a case involving pleading only. (Pet. Brief, p. 12.) The lessor of a mining property was sued for damage caused by subsidence. The Court specifically points out in its opinion that the question involved is the liability of the owner of a mine for the act of his lessee in injuring the surface right of a third person in conducting mining operations. The Court then goes on to decide that very question. Thus, the case is directly in point. The decision of the Court is as follows:

> "Ordinarily the lessee of the minerals, and not the lessor, is liable for a subsidence of the surface caused by mining operations over which the lessee is in full control. On the other hand, if the lessor reserves the right in the lease to direct or control the mining operations of the lessee and gives directions as to taking coal from the pillows or supports of the mine and in consequence of such directions the surface caves in, he is liable to the owner of the surface for the resulting injury. Kistler v. Thompson, 158 Pa. 139, 27 A. 874. Or if he assumes control over the operation, whether the right to do so was reserved in the lease or not, and injury results from his control or direction, he would be liable. In the case of Campbell v. Louisville Coal Co., 39 Colo. 379, 89 P. 767, 10 L. R. A. (N. S.) 822, the Colorado court seems to hold that the lessor would be liable if he received a benefit from the mining operations, with knowledge of the facts, whether he did or did not

> reserve in the lease a control or direction over the mining operation, or whether or not he was exercising any control whatever over same, proceeding upon the theory that there was an implied duty upon him, which should be read into the lease, of seeing that the lessee so conducted the mining operations as not to injure the surface. As to this, we cannot subscribe, as the mere receipt of a royalty for the mineral even if he knows of the mining operations would not authorize or require him to interfere and control simply because he may have been the owner of the mineral, in the absence of the reservation of the right to do so under the terms of the lease." (At p. 152.)

Petitioner calls attention to Republic Iron & Steel Co. v. Barter (Ala.), 118 So. 749 at 751, cited by the Circuit Court (R. 438), and attempts at this late date to bring herself within the rule established by it (Pet. Brief, pp. 12 and 13). The case involved a lease that expressly contemplated and authorized the lessee to rob the mine of pillars and leave the surface without support. Thus, it is one of the type of cases noted by the Ninth Circuit Court of Appeals as an exception to the general rule that the lessor of a mining property is not liable for the acts of his lessee. Attempting to avail herself of benefit of this exception to the general rule, Petitioner goes outside the record in search of additional evidence. This is supplied by Petitioner in the form of a statement as follows:

> "Butte Copper and Zinc had previously opened the mine, had mined certain ores. Later Anaconda, under a lease from Butte, re-mined this property, and the plaintiff's property subsided. * * *." (Pet. Brief, pp. 12 and 13.)

There is no evidence in the record to the effect that

Butte Copper and Zinc Company of itself ever mined any ores in the Emma Mine, or that Anaconda under a lease re-mined the property. Since this statement is gratuitously made, we deem it our right not only to assert that the statement is contrary to the record, but also that the statement is not true. There is no evidence in this case that Butte Copper and Zinc Company of itself ever mined any ores in the properties leased to the Anaconda Company.

Thus, as the Ninth Circuit Court of Appeals so found, there is no evidence to support this proposition now contended for by Petitioner. The lease involved in our case does not specifically contemplate or provide for operations that would necessarily cause subsidence and, therefore, does not come within that exception to the general rule.

Petitioner contends that the case of Jackson Hill Coal Co. v. Bales, 108 N. E. 962, cited by the Ninth Circuit Court of Appeals (R. 437), fails to support the proposition for which it was cited (Pet. Brief, pp. 14 and 15). The statement is made that in that case the owner and not the lessee was held liable. This is incorrect. The original complaint called the defendant the "owner" but this was amended to "lessee" during the trial. The case actually holds that the lower court properly refused to instruct the jury that the owner of a mine, and not the lessee operating it, is liable for injuries to surface property due to insufficient support. The case fully supports the decision of the Circuit Court of Appeals in the instant case.

The quotation and comment thereupon by Petitioner, with respect to Kistler v. Thompson, 27 A. 874

(Pet. Brief, p. 15), show conclusively that the case supports the proposition for which it was cited by the Ninth Circuit Court of Appeals (R. 438), i. e., that an exception exists to the general rule that the lessor is not liable for the acts of his lessee if the lessor retains or assumes control and direction over lessee's operations.

The case of Cabot v. Kingman (Mass.), 166 Mass. 403, 44 N. E. 344, 33 L. R. A. 45, cited by Petitioner (Pet. Brief, p. 15), together with the reference to Thompson on Negligence, paragraphs 654, 665 and 668 (Pet. Brief, p. 15), merely constitute further illustrations of the rule set forth in Bower v. Peate (supra) to the effect that where the work to be performed will foreseeably result in injury to third parties unless precautions are taken, then, it is no defense for the owner to show that the work was performed by an independent contractor. That question is not involved here.

The last case cited by Petitioner is Standard Oil Co. v. Watts, C. C. A. 7th, 1927, 17 F. 2d 981. (Pet. Brief, p. 16.) The Petitioner makes her quotation from this case appear as a complete sentence. However, the complete sentence actually reads as follows:

> "* * * It goes without saying that the removal of any part of subjacent support has some tendency to bring down what is above, and where it appears there has been such removal, notwithstanding it may also appear that supposedly sufficient support was left, a subsidence of what is above, not otherwise explained, may be assumed to have been thus caused.* * *." (At p. 982.)

This case is no authority for the proposition that

the lessor is liable for subsidence caused by the mining of his lessee.

The only other citation urged in support of Petitioner's contention is Section 6773, R. C. Mont. 1935. (Pet. Brief, p. 8.) This reads as follows:

> "Each co-terminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill, and taking reasonable precaution to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations."

The statement that only the first clause has any relevancy (Pet. Brief, p. 9) is absurd. The statute, of course, is to be read in its entirety in order to determine the legislative intent. The first part is merely an expression of the common law. Neyman v. Pincus, 82 Mont. 467, 487, 267 P. 805, at 810. The remainder of the statute confines it to "* * * excavations * * *" by the "* * * adjoining * * *" landowner "* * * for the purposes of construction * * *." The statute clearly has no relevancy with respect to our present question. The statute refers to adjoining lot owners excavating for foundations for the purpose of constructing buildings or other structures. This is doubly clear if we examine Sec. 832, Cal. Civ. Code, cited by Petitioner as "identical" with the Montana statute. (Pet. Brief, p. 8.) Actually the statutes are far from being identical, although obviously intended to cover the same subject. The California statute goes on at length, using language showing that the pro-

vision "for purposes of construction" means excavations made for building purposes and not mines. Even Petitioner admits that "mining has no purpose of construction." (Pet. Brief, p. 9.)

In this connection it should also be pointed out that Petitioner's property lies on the surface of the Nellie Lode Mining Claim. (R. 176.) There is no record of any mining ever having been done on the Nellie. The mining, according to the record, was all performed in the Emma Mine. The Emma Vein apexes 500 feet north of the Poague property (R. 199-200) and has been mined from the 200-foot level to the 2200-foot level down the slope of the vein (R. 290), which on its dip extralaterally passes beneath the Petitioner's lots 600 to 800 feet below the surface (R. 213). This work was done through the Emma Shaft, which is situated at a distance of some 500 feet north and from 220 to 250 feet east of Petitioner's property. (R. 186.) Petitioner's witness Strasburger said that the damage resulted from mining in the Emma Mine. (R. 208-209.) Thus, it appears that the mining or excavating was not performed in either adjoining or coterminous land, as contemplated by the statute, even though both claims were owned by Respondent.

Petitioner stresses her contention that the decision of the Circuit Court "clouds and impairs the quiet enjoyment of all other urban real property," particularly in Butte. (Pet. Brief, p. 4.) If the statute relied on by Petitioner was made applicable to mining operations, there actually would be a serious danger to the quiet enjoyment of urban property in Butte. By merely notifying the owners of surface property in

Butte and using ordinary care and skill and taking reasonable precautions to sustain the surface, any mining company could avoid all liability.

D. Respondent's Authorities

The authorities uniformly support the contention of Respondent and the decision of the Ninth Circuit Court of Appeals herein.

There is neither allegation nor proof that the mining was negligently done, but even where mining done by a lessee is done in a negligent manner the general rule is as follows:

> " * * * The lessor of a mine is ordinarily not liable to the owner of the surface for damages caused by the lessee's negligence in mining and taking out coal, unless he has retained or assumed control over the operations, or, with knowledge of the facts, received a benefit therefrom."

40 Corpus Juris, page 1197.

Other texts have the following to say:

> "§ 185. *Lease as Affecting.*—A lessee of the mine, and not the lessor, is liable for subsidence of the surface caused by mining operations over which the lessee is in full control. However, a lessor is liable for subsidence caused by operations by his tenant under a mining lease which provides for excavations which will remove the surface support. The lessee of the lower strata of a mine cannot recover from the mineowner for injuries to his premises caused by the operations of the lessee of the upper strata, unless the owner could have foreseen at the time of making the lease of the upper strata that the operation thereof would necessarily injure the premises of the lower lessee."

36 American Jurisprudence, Sec. 185, page 407.

"A lessee of the minerals, and not the lessor, is liable for a subsidence caused by operations of the former over which he has full control. Dicta in Kistler v. Thompson, 158 Pa. 139, 27 Atl. 874, and Little Schuylkill Nav. R. & Coal Co. v. Tamaqua, 1 Walk. (Pa.) 468."

Note to Kansas City Northwestern Railroad Company v. Charles Schwake, Kan., 68 L. R. A. 673, 695.

American Law Institute, Restatement of Torts § 820, p. 207, sets forth the rule of liability for withdrawing naturally necessary subjacent support. At page 209 we find the following discussion of that rule:

"g. *Persons subject to liability—liability of transferee.* The person liable under the rule stated in this Subsection is the actor who withdraws the naturally necessary support. It is immaterial whether, in respect to the supporting land, the actor be owner, possessor, licensee or trespasser. The owner or possessor of this land is not liable under the rule stated in this Section unless he was an actor in the withdrawal of support."

Again in American Law Institute, Restatement of Torts, in Section 837 at page 294 we find the following:

"c. *Lessor's Liability.* This Section merely states the conditions which must exist before a lessor of land is liable for harmful activities on the land when he has taken no active part in carrying on such activities (see § 834). A lessor of land usually has no control over the conduct of the lessee or the persons upon the leased land while the lessee is in possession of it, and therefore the lessor is not ordinarily responsible for the acts of the lessee or third persons thereon. Where, however, the lessor makes the lease under

the condition stated in clauses (a) and (b), he subjects himself to liability."

At page 294.

Subsections (a) and (b) of Section 837 read as follows:

"(a) At the time when the lease was made, renewed or amended, the lessor consented to the carrying on of the activity, or knew that it would be carried on, and

"(b) the activity, as the lessor should have known, necessarily involved or was already causing such an invasion."

At page 293.

Neither one of these Subsections has any application to the present case.

Republic Iron & Steel Co. v. Barter, 118 So. 749 (Ala.); Alabama Clay Products v. Black, 110 So. 151 (Ala.); Jackson Hill Coal Co. v. Bales, 108 N. E. 962 (Ind.); Kistler v. Thompson, 27 A. 874 (Pa.), as we have already pointed out, all support Respondent's position.

In Hill v. Pardee, 143 Pa. 98, 22 A. 815, the Court said that it appearing that the removal of coal without leaving sufficient support for the surface was the act of a lessee of the right to mine the coal, prima facie the lessor of such right was not liable to the owner of the surface for the damages.

The Supreme Court of Colorado, in the case of Campbell v. Louisville Coal Co., 89 P. 767, stated, at page 769:

"* * * The case does not fall within the general rule to the effect that the lessor of premises is not liable for the negligence of his lessee, because,

ordinarily, the lessor does not retain, and is under no obligation to retain, control over the demised premises. * * *."

In the Colorado case cited supra the Court decided the lessor was liable for injury to the surface owner's property because the lessor had *actual knowledge* that the lessee removed all of the coal, leaving no supports whatsoever, and the lessor consented to and sanctioned these negligent acts of the lessee. See, also, Nisbet v. Lofton, Ky., 277 S. W. 828, in which case the court held the owner liable because he had actual knowledge and consented to the negligence of another in removing coal without leaving supports for the surface. The party doing the actual mining had no lease and the owner could have stopped the mining at any time after the surface owner made complaint.

In the following cases the courts have stated:

"* * * The principle of law is so well settled that, where one carries on an independent employment in pursuance of a contract, by which he has entire control of the work, and the manner of its performance, his employer is not liable for any negligence of which he may be guilty in the course of his employment, that the citation of authorities is unnecessary labor. * * *."

Smith v. Belshaw et al., Cal., 26 P. 834.

"'It is the contention of the defendant that the law of Noonan v. Pardee controls the instant case. With this contention, the court in banc is in accord, and it is of the opinion that the commonwealth cannot recover damages from an abutting subsequent property owner for the subsidence of a highway caused by a former owner of the mineral estate. Before the commonwealth could recover in a case of this kind, it must aver and prove that the owner whose premises abutted on

the highway has actually mined the coal that caused the damage complained of, and that such mining was the proximate cause of the subsidence of the surface. An examination of the cases cited in this opinion, shows that where recovery has been permitted, it is against a defendant who mined the coal.' "

Commonwealth v. Panhandle Min. Co., Pa., 172 A. 106, 107.

"It is well established in this state, as in other jurisdictions, that a landlord is not liable for acts of negligence of tenants. Among the leading cases are Kalis v. Shattuck, 69 Cal. 593, 11 P. 346, 58 Am. Rep. 568, and Higgins v. Los Angeles Gas & Elec. Co., 159 Cal. 651, 115 P. 313, 34 L. R. A. (N. S.) 717. In the first of these cases it was held (69 Cal. 593, at page 597, 11 P. 346, 58 Am. Rep. 568) that a landlord is not liable for the consequences to others of a nuisance in connection with property in the possession and control of a tenant unless the landlord authorized or permitted the act which caused it to become a nuisance occasioning the injury. As stated by the Supreme Court of Massachusetts: 'A landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it, has been leased for a lawful and proper purpose.' Saltonstall v. Banker, 8 Gray, 195; Peck v. Peterson, 15 Cal. App. 543, 115 P. 327. The receipt by these defendants of royalty for the minerals, under the circumstances found, would not authorize or require them to interfere with or control the mining operations carried on by their lessee. Alabama Clay Products Co. v. Black, 215 Ala. 170, 110 So. 151. It is not shown or found that the defendants Hastings or Leet, as administrator, have any interest in the relief sought by the respondents. In the lease of the mining interests these appellants retained the right to enter upon and examine the property at

any time and, by its terms, they required the mining company to operate the mine with due regard to the safety, development and preservation of the premises as a working mine. No damages were awarded against the absentee landlords (these appellants), nor were costs assessed against them. We must therefore conclude that the trial court was of the view that they were in no way liable in the premises. No connection has been established between these appellants and the continued flow of water through the tunnel. The restraining order against the maintenance of that condition, so far as these appellants are concerned, seems an idle act. The trial court should have granted their motion to vacate and set it aside. The judgment and order, so far as concerns these appellants, should be reversed and the appellants should have their costs on appeal. It will be so ordered."

O'Leary v. Herbert et al., Cal.,
55 P. (2d) 835, 836.

"It is settled law in this Commonwealth that the Lessor of a coal mine is not responsible in trespass for the negligent mining by his lessee which results in damage to the surface. In Hill v. Pardee, 143 Pa. 98, 22 A. 815, this court held that in such a case the disturbance of a right of surface support is a tort for which the party which did the mining and not the Lessor was responsible. In Offerman v. Starr, 2 Pa. 394, 44 Am. Dec. 211, this court said in an opinion by Chief Justice Gibson: 'Respondeat superior is inapplicable to an owner of land, for acts of negligence in a business not conducted by him and for his account. What had these defendants to do with the direction of the business or the coal when it was mined? Lewis covenanted to sink the slope, erect the engine, to take out a certain number of tons each year, according to the most approved method of mining, and carry it to the landing and to pay a certain sum per ton for it. So far the defendants had nothing to do with the busi-

ness, but to receive their rent. But they reserved a right to visit and examine the manner in which the business should be carried on in the mine; and to resume the possession should the tenant refuse to furnish statements of the amount taken out, or pay the rent. These clauses do not constitute a reservation of the possession or a right to interfere with the direction of the business. The right of visit was to enable them to see whether the tenant was performing his engagements, in order to found process against him if he were breaking them; and the right to resume the possession was to put an end to the business altogether. The lease was analogous in all respects to the lease of a farm with a clause of re-entry for bad farming, or non-payment of rent. On no principle, then, could the acts of Lewis be imputed to his lessors.'

" * * * Mere collection of 'rents and royalties' as a part of the purchase price does not constitute a participation in the mining."

Greek Catholic Congregation of Borough of Olyphant v. Plummer et al., (Pa.), 12 A. (2d) 435, 437, 438.

CONCLUSION

The authorities cited by Petitioner do not support Petitioner's specifications of error. There is no conflict between the laws and decisions of Montana and the decision of the Circuit Court of Appeals in our case. There is no conflict with a decision of any other Circuit Court. The decisions relied on to support Specifications III and IV are cases involving work performed by independent contractors that would foreseeably cause injury if precautions were not taken, or cases where the lessor has been held liable because he falls within the scope of one of the four

exceptions to the general rule, i. e., that the lessor is not liable for the acts of his lessee.

None of the texts or statutes cited by Petitioner relate to the specific question at issue in this case. We are here confronted with a question of liability of a lessor for the operation of its mine by the lessee. The Butte Copper and Zinc Company is a citizen of the State of Maine (R. 7) and leased a mine in Butte, Montana, to the Anaconda Copper Mining Company in the year 1917 (R. 164, 371); that Company, lessee, operated the mine continuously from that date to the date of the trial (R. 287). Several renewals of the lease were made, the last one being on June 1st, 1940 (R. 167-168, 394), twenty-three years after the first lease was made, and more than a year before any damage resulting from operations under the lease was disclosed (R. 293). The damage resulted only from a slip of a fault, an unforeseen contingency. (R. 287 and 306.) There is no negligence either alleged or proven by the Appellee. In fact, Appellee states that negligence is not an issue in this case. (Pet. Brief, p. 8.) The mining was done in a careful and workmanlike manner. When the ore was removed the stopes were timbered and then filled. No stoping or removing of ore was done within two hundred feet of the surface and in many places not within 300 feet. The testimony on this point is uncontradicted. (R. 304-306.)

Wherefore, Respondent respectfully submits that

the Petition for Writ of Certiorari is without merit and should be dismissed.

Respectfully submitted,

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Service of the foregoing Respondent's Reply Brief to Petitioner's Brief in Support of Petition for Certiorari acknowledged and copy thereof received this 19th day of February, 1948.

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